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THE PROPOSED MULTILATERAL AGREEMENT ON COMMERCIAL RIGHTS IN INTERNATIONAL CIVIL AIR TRANSPORT

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I

INTERNATIONAL civil aviation should never be considered as something apart from the pressing problems of world political and economic strife or cooperation. The representatives of many nations who met at Chicago in 1944 realized this to the full. The Preamble to the "Convention on International Civil Aviation" acknowledges some of their fears and expresses some of their hopes:

"WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

"WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

"THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

"Have accordingly concluded this Convention to that end."¹

¹ INTERNATIONAL CIVIL AVIATION CONFERENCE, Chicago, Nov. 1 to Dec. 7, 1944, *Final Act and Related Documents*, Dep't of State No. 2882, Conference Ser. 64. (Gov't Print. Off. 1945). In addition to the "Convention," this publication also contains: "Interim Agreement on International Civil Aviation"; "International Air Services Transit Agreement"; and "International Air Transport Agreement."

On April 4, 1947 this Chicago Convention came into force and its Preamble became a living covenant between sovereign peoples. But the agreements contemplated in the Preamble for inclusion in this Convention are not yet complete. The nations represented at Chicago in 1944 did agree on adequate provision for the adoption of "principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner." But they could not agree on the hoped-for "principles and arrangements . . . in order that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically." After two and a half years those principles are still not settled. My personal views have never changed. The Convention should be completed. I feel that the world needs uniform economic principles applicable worldwide for international air transport as urgently as it needs the uniform operating and safety regulations for international air navigation agreed upon at Chicago. But these principles, when finally adopted, must provide a basis for both *equality of opportunity* and *sound and economical air transport operations*. One should not be sacrificed for the other. A balance must be found.

The background, partial accomplishments, and the failure to agree at Chicago, are well known.² At the opening of the Conference, Canada favored the organization of an international authority along the general lines of the United States Civil Aeronautics Board, with adequate international regulatory power over routes, rates, frequency and capacity of air transport operations.³ The position of Great Britain was quite similar.⁴ Australia and New Zealand argued ably and eloquently, though unsuccessfully, for the internationalization of main air transport trunk routes,⁵ the same position which the Labour Party had taken in Great Britain.⁶ The United States, while standing on its traditional support of airspace sovereignty, desired few restrictions and no international economic regulatory control of air transport rates,

² For additional material on the Chicago Conference, see: Harry A. Bowen, *The Chicago International Civil Aviation Conference* (April 1945) 13 Geo. Wash. L. Rev. 308-327; Stephen Latchford, *Comparison of the Chicago Aviation Convention with the Paris and Habana Conventions* (March 11, 1945) 12 Dep't State Bull. 411-420; Howard Osterhout, *A Review of the Recent Chicago International Air Conference* (March 1945) 31 Va. L. Rev. 376-386; Richard Kermit Waldo, *Sequels to the Chicago Aviation Conference* (Winter-Spr. 1946) 11 Law and Contemp. Prob. 609-628; Also entire issue of *Revue Générale de l'air*, Mars-Avril-Mai-Juin, IX Année, Nos. 2-3, 1946.

³ Wartime Information Board, Canada and International Civil Aviation (Ottawa March 1945).

⁴ Sir Henry Self, *The Status of Civil Aviation in 1946* (Oct. 1946) 50 Journal of the Royal Aeronautical Society 719-785; Harold Stannard, *Civil Aviation: An Historical Survey* (Oct. 1945) 21 International Affairs 497-511; *The Air After Chicago*, editorial in *The Economist*, Dec. 30, 1944, Vol. CXLVII, No. 5288, pp. 860-862.

⁵ Daniel Giles Sullivan (New Zealand Minister of Industries and Commerce, Supply and Munitions), *International Ownership of Air Transport* (Dec. 1944) 8 Free World 503-6 — also included in *INTERNATIONAL AIRWAYS* compiled by Alberta Worthington (N.Y., H. W. Wilson Co., 1945) pp. 123-129.

⁶ *WINGS FOR PEACE: LABOUR'S POST-WAR POLICY FOR CIVIL FLYING* (April 1944).

frequency or operating capacity.⁷ It opposed international control of routes and preferred (at least at the opening of the Conference) fixing of routes by specific agreement. As the Conference progressed an effort was made to agree on various compromise formulas, particularly on frequency and capacity, which might have brought the contending parties together, but without success. In the absence of general agreement the Chicago Convention omitted regulatory provisions as to air transport routes, rates, frequency or capacity, but did include the following paragraphs directly affecting international air transport services:

Article 1

"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 6

"No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Article 68

"Each contracting State may, subject to the provisions of this Convention, designate the route to be followed within its territory by any international air service and the airports which any such service may use.

Article 96

"For the purpose of this Convention the expression:

(a) 'Air service' means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

(b) 'International air service' means an air service which passes through the airspace over the territory of more than one State.

(c) 'Airline' means any air transport enterprise offering or operating an international air service.

(d) 'Stop for non-traffic purposes' means a landing for any purpose other than taking on or discharging passengers, cargo and mail."

The Conference also opened for signature the *International Air Services Transit Agreement* to provide for the mutual exchange of the privilege to fly over non-stop or to land for servicing and other non-traffic purposes in contracting states — the so-called first and second "freedoms." It also opened for signature the *International Air Transport Agreement* to provide for the mutual exchange of these transit privileges and also the commercial privileges to land for the purpose of putting down and taking on passengers, mail or cargo in the contracting states — the so-called third, fourth and fifth "freedoms." This Transport Agreement was sponsored principally by the United States and was based on its expressed desire for minimum economic international regulation or limitation of international flight. It does, however, restrict the granting of privileges to take on and discharge pas-

⁷ *Blueprint for World Civil Aviation: The Chicago International Civil Aviation Conference of 1944 as viewed by four members of the United States delegation in recent magazine articles*, Dep't of State No. 2348, Conference Ser. 70 (Gov't Print. Off. 1945).

sengers, mail and cargo "to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses." It also limits the so-called fifth freedom (the privilege to pick up and discharge passengers, cargo and mail in states other than that of the nationality of the aircraft) to the territory of other contracting states. In other words, in case the United States, the Netherlands, and Sweden became (as they did) parties to the Air Transport Agreement but Great Britain did not, a United States air service could pick up traffic in the Netherlands bound for Sweden on the outward journey, but could not pick up traffic on the return journey in the Netherlands bound for Great Britain (a non-contracting state). Other than these "homeland routes" and "fifth freedom" limitations, the Air Transport Agreement left the future development and operation of international air services with practically no control other than that of the nation operating the service.

The Chicago Conference also adopted an *Interim Agreement on International Civil Aviation* under which the Provisional International Civil Aviation Organization (PICAO) was set up in Montreal to continue until the permanent Convention came into force. PICAO was charged, among other things, with the study of the long-range problems affecting international air transport on which the Chicago Conference had not been able to agree. The Conference fully understood, in opening the Transit and Transport Agreements for signature, that they were provisional only and that no nation was obligated to accept them merely because it had accepted the principal Convention.

At the first meeting of the Interim Assembly of PICAO held in Montreal in May, 1946, a proposed multilateral transport agreement (prepared by the PICAO Air Transport Committee) was presented for discussion. The Assembly determined, however, not to complete or present for signature any final agreement at that time. It returned the entire subject to the Air Transport Committee of PICAO for further study "for the purpose of developing a multilateral agreement" for submission to the next annual Assembly.⁸

On May 6, 1947 the First Assembly of the International Civil Aviation Organization (ICAO) will meet in Montreal to perfect its permanent organization, now that the Chicago Convention has come into force. At that meeting the Assembly will also consider a new draft "Multilateral Agreement on Commercial Rights in International Civil Air Transport," prepared by the PICAO Air Transport Committee pursuant to the resolutions of the 1946 Interim Assembly. The report

⁸ For text of the draft agreement presented to the 1st PICAO Interim Assembly in 1946 and discussions held between May 22nd to June 5, 1946 in Commission III of the 1st Interim Assembly, see: PICAO Doc. 2089-EC/57, Commission No. 3 of First Interim Assembly: *Discussion on the Development of a Multilateral Agreement on Commercial Rights in International Civil Air Transport*, October 1946.

of the Committee and its appendices⁹ are printed in full on pages 235-53 of this issue of the JOURNAL. These appendices include the text of the draft multilateral agreement, an official commentary on its terms, and a statement of minority views. The report and proposed draft agreement did not receive the unanimous support of the Air Transport Committee. The resolution of the Committee to adopt the proposed draft agreement and commentary as final texts for transmission to the First Assembly of ICAO was adopted by the affirmative vote of representatives of Brazil, Canada, Czechoslovakia, France, Iraq, Netherlands, and Norway. Against the resolution were the representatives of China, Ireland, the United Kingdom, and the United States, while the representatives of Belgium and India abstained from voting. Included in the statement of minority views attached as Appendix C to the Air Transport Committee's report will be found suggested substitute Articles 7, 8, and 10, for consideration in lieu of the corresponding articles as submitted in the draft agreement by a majority of the Committee.

It is quite impossible to exaggerate the importance of this draft agreement in future world affairs or to overestimate its direct and indirect effects if accepted. Very properly, it has been prepared as a treaty and must be so signed and ratified before it can come into force. In my judgment the solemn treaty form which traditionally has characterized international covenants of grave importance should always be used when nations expect to be bound over long periods of time in matters affecting the general public welfare. Treaties are not easily amended nor do peace-loving peoples carelessly disregard them. This proposed new agreement, if accepted and put into force, will form the pattern for the control of international air transport for many years to come. In so doing, it will at the same time affect the volume and avenues of world trade and the internal economy and prosperity of many nations.

But before it is accepted, the draft agreement must be fully understood. It raises new questions which were not discussed at Chicago nor at Montreal; it proposes solutions never before considered of some of the questions that have been discussed; it seems to propose other solutions which were definitely rejected at Chicago and which contributed to the ultimate failure to agree on air transport control principles.

II. FREEDOM OF THE AIR

The report of the Air Transport Committee (paragraph 10) recites that: "The Agreement seeks to confer a regulated freedom of the air under which all States will have equal and reciprocal commercial rights." In the Preamble to the draft agreement itself is contained a statement that "the contracting States desire to affirm that a regulated

⁹ *Multilateral Agreement on Commercial Rights in International Civil Air Transport: Proceedings of the Air Transport Committee, PICA Doc. 2866-AT/169, Feb. 26, 1947.*

freedom of the air, under which all participating States may exercise commercial rights under rules which shall be the same for all, is the only means by which the development of international civil air transport can be secured in accordance with the aims of the Convention." Although the next clause of the Preamble does recite that the contracting states desire to grant to each other authorization to operate scheduled international air services as contemplated by Article 6 of the Convention, nevertheless the language of the quoted portion of the report and of the Preamble raises serious difficulties. The proposition that "a regulated freedom of the air" is the only basis for solution of the international air transport problems was not, so far as I am advised, contained in the Chicago or Montreal resolutions.

Either the new agreement implies a direct attack on the hitherto accepted doctrine of airspace sovereignty, or inexact language is used which should not have appeared in the draft agreement. The term "freedom of the air" and the term "sovereignty of the air" are mutually exclusive. The term "regulated freedom of the air" I have never seen defined. A further implication that the draft agreement may be construed as a denial of the continued full acceptance of the doctrine of airspace sovereignty as heretofore known in international law is found in the fact that Chapter II of the draft agreement is entitled "Freedom of the Air." In this chapter, which I shall discuss later, is included Article 6 under which "each contracting State shall have the right that its duly authorized airlines shall be entitled to fly their aircraft across the territory of any other contracting State without landing and to make, in such territory, stops for non-traffic purposes and for the purpose of putting down and taking on passengers, mail and cargo." The same chapter also includes the articles which severely limit the presently existing right of each state to designate routes to be followed and airports to be used by air services entering its territory.

The draft agreement (if accepted) and the Chicago Convention would be separate international instruments. While it is stated in Article 1 of the draft agreement that the provisions of both instruments shall be applicable to the rights and obligations of contracting states under the new agreement, nevertheless under ordinary rules of statutory construction, the new agreement would supplant and nullify the older Convention wherever they are in conflict. The agreement, affirmatively based on "Freedom of the Air," would, in my judgment, effectively cancel Article 1 of the Convention which asserts the contrary doctrine of airspace sovereignty.

Prior to the outbreak of World War I, an academic battle had been waged as to whether each nation has sovereignty over its airspace or whether the air is free to navigation of all aircraft. These two points of view are directly antagonistic. When Fauchille in 1901 announced his celebrated doctrine that "the air is free" and repeated it at the Institute of International Law in 1902, he was denying national air-

space sovereignty. He was challenged by Westlake at the 1906 meeting of the Institute, who insisted upon the right of each state to control its airspace and exercise full sovereignty. Under the doctrine of airspace sovereignty, it has always been conceded that any nation flown over could exclude or permit the entry of such foreign aircraft as it might determine and that the privilege of flight could be limited by the terms of the license granted by the nation flown over. Under the theory of "freedom of the air," aircraft of all nations were assumed to have a right to fly wherever they saw fit, just as merchant ships may navigate the high seas which are admittedly not subject to national sovereignty, and that this right to fly existed without consent of any nation flown over.

The recognized international law authorities of the period never had any doubt that the two theories were mutually irreconcilable. As Lycklama à Nijeholt said in 1910:

"The sovereignty theory grants the state in the air every possible right that sovereignty implies; in the freedom theory the state enjoys only such rights as common accord will grant."¹⁰

Professor H. D. Hazeltine, one of the great American exponents of international law, who spent his active professional years in England, made it perfectly clear in one of his published 1911 lectures that if a nation claimed airspace sovereignty, the other theory of freedom of the air could not be accepted:

"There are two great groups of theories as to the rights of states in the airspace above their territories and territorial waters. There are, first, the freedom-of-the-air theories. . . . The second group of theories may be designated the sovereignty-of-the-air theories."¹¹

As to the necessity of any partial, or may we say "regulated," freedom of the air as a basis for international agreement in aid of development of air navigation, he made this wise prophecy:

"What is there to prevent the states of the world — sovereign each in its own airspace — from concluding an international convention regulating international aerial locomotion; and thus contractually — by treaty — voluntarily restricting each the exercise of its sovereign rights within certain defined limits? I am willing to predict that a uniform international regulation of aerial navigation will more readily be brought about by admitting the doctrine of full sovereignty in the airspace than by asserting the doctrine of full or even partial freedom."¹²

Sir Henry Erle Richards, lecturing at Oxford in 1912, stated the problem:

"Are Governments to have sovereignty over the space above their territories in the same way as they have sovereignty over the territories themselves? Are they to be able to regulate or forbid the user of that space as they will, subject only to such reciprocal

¹⁰ J. F. LYCKLAMA A NIJEHOLT, *AIR SOVEREIGNTY* (The Hague, Martinus Nijhoff, 1910) 8.

¹¹ H. D. HAZELTINE, *THE LAW OF THE AIR* (London, Univ. London Press, 1911) 9.

¹² *Id.* at 31.

obligations as they may bind themselves to perform by agreement? Or to take the opposite contention, is the airspace to be free to all like the high seas; subject, at the most, to a control restricted to certain specified purposes and exercisable only within defined limits?"¹³

Later in the same lecture he stated very accurately that flight of aircraft of one state over the territory of another state does not constitute the exercise of a right but merely an easement:

"But I go further and submit to you that no limited measure of control can enable States to adequately protect their territories; for the physical relations of the air to the earth beneath it are such that any user of the airspace for aerial traffic must necessarily affect the interests of the State and its inhabitants. If that be so, there can be no 'right' to pass through the air; for the so-called right must be subject to the legislation of the subjacent State without limit, and an easement enjoyed at the pleasure of a third party is not a 'right,' it is a mere liberty. It is far better from every point of view to admit that States have full sovereignty over their airspaces, and to trust to the desire for reciprocity and the general comity of nations to ensure sufficient facilities for aerial traffic."¹⁴

I had thought that the matter was finally settled by the events of World War I and the subsequent adoption of the 1919 Paris air navigation convention. During that war, nations both belligerent and neutral closed their air boundaries, thereby declaring in substance that they had complete airspace sovereignty. At the end of the war, an Aeronautical Commission was charged by the Peace Conference with preparing a convention for the regulation of air navigation in time of peace. Its Legal Subcommission, in submitting a draft of the proposed convention, made the following authoritative statement in its report:

"The first question placed before the Sub-commission was that of the *principle of freedom or of sovereignty of the air*.

"Between these two principles the Paris Convention (June 29, 1910) had not felt that it should express a choice. The new text proposes a solution. But, whereas before the war opinion developed in the majority of countries was favorable to the principle of freedom of the air, the opinion expressed in the Legal Sub-commission is favorable to the full and exclusive submission of the airspace to the sovereignty of the subjacent territory. It is only when the column of air hangs over a *res nullius* or *communis*, the sea, that freedom becomes the law of the air.

"Therefore, the airspace is part of the legal regime of the subjacent territory. Is this territory that of a particular State? Then the atmospheric airspace is subject to the sovereignty of that State. Does it escape all sovereignty as the free sea? Then the airspace is also free above the sea, as the sea itself.

"It results then that, by virtue of its sovereignty, the subjacent State, within its borders, can forbid flight and, with greater reason, landing. But with unanimity the Commission has judged that if this right was to be rigorously asserted as an indispensable safeguard with regard to third

¹³ Sir Henry Erle Richards, *Sovereignty Over the Air*, a lecture delivered before the University of Oxford on October 26, 1912 (Oxford, Clarendon Press, 1912).

¹⁴ *Ibid.*

party States, it should not be insisted on in the relations of those States which trust each other; namely, those which have taken part in the war as Allies or associates, and those neutrals who recognize the right to form with them the present aeronautical union.

"Consequently, after having recognized that each of these enjoys completely and exclusively the right of sovereignty in the airspace above its territory, each contracting State pledges to accord, in time of peace, the liberty of innocent passage to the aircraft of other contracting States, provided that the conditions established in the Convention are observed."¹⁵

As a result, the Convention of 1919 "Relating to the Regulation of Aerial Navigation" when adopted and eventually ratified, contained the following Article I, which is now accepted as the statement of existing international law:

"The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory.

"For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."¹⁶

Speaking of this Convention and the discussions which preceded it, Sir Arnold D. McNair (who now represents the United Kingdom on the World Court) said in 1930:

"Then came the great war, and it accelerated a decision as between those competing theories, and the one which triumphed by treaty in Europe, including Great Britain, in the year 1919, was the third, the theory of complete sovereignty, subject to a mutual treaty right of the free entry and passage of the non-military aircraft of other countries.

"I lay emphasis upon the fact that that is merely a treaty right, not considered to exist by customary international law, and therefore requiring an express treaty for its creation.

"That treaty is, of course, the Convention which I have already mentioned, the International Convention of 1919 for the regulation of Aerial Navigation. . . ."¹⁷

Speaking at the same air conference in 1930, Dr. Albert Roper, now Secretary-General of ICAO, who had been actively connected with the Aeronautical Commission of the 1919 Peace Conference, stated:

"Rejecting in its first sentence the theory of the freedom of the air, the Convention sets down as a prefatory principle the recognition of the sovereignty of the states over their airspace. This brutal suppression of the freedom of the sky, so dear to eminent jurists in the early years of the century, has not been criticized by any government; some governments have shown themselves more liberal than others in the exercise of their right of sovereignty, but not one has thought of renouncing it."¹⁸

¹⁵ Translated from *La Paix de Versailles: Aéronautique*, Paris (Les Editions Internationales, 1934).

¹⁶ *International Convention Relating to the Regulation of Aerial Navigation, October 13, 1919*, Dep't of State Pub. No. 2143 (Gov't Print. Off., 1944).

¹⁷ Arnold D. McNair, *The Beginnings and the Growth of Aeronautical Law* (1930) 1 JOURNAL OF AIR LAW 383-392.

¹⁸ Dr. Albert Roper, *Recent Developments in International Aeronautical Law* (1930) 1 JOURNAL OF AIR LAW 395-414.

The Madrid (Ibero-American) Convention of 1926, the Havana (Pan American) Convention of 1928, and now the Chicago Convention of 1944 (in Article I quoted earlier) have each recognized the exclusive sovereignty of each state over its airspace. Similar provisions appear in many legislative enactments, such as the following:

British Air Navigation Act of 1920: "Whereas the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air super-incumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto. . . ."¹⁹

Air Code of U.S.S.R. (1932): "Article 2 — The U.S.S.R. has complete and exclusive sovereignty over the airspace of the U.S.S.R."²⁰
U.S.A., Air Commerce Act of 1926 as amended by Civil Aeronautics Act of 1938: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace above the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."²¹

The accepted international law on the subject was summarized in the 2nd (1945) Edition of Hyde's *International Law*, as follows:

"*Some Conclusions.* It would betray confusion of thought to intimate that in the absence of agreement there is, in an international sense, no law of the air. The evidence is abundant that States have reached a degree of unanimity in their assertion of the right of control over the airspace above their territories which suffices to warrant the conclusion that that right is to be regarded as exemplifying a principle of international law. Even when a State accords to another, by agreement, the privilege of use of superjacent airspace, the former does not completely relinquish control over the same, but simply permits that use under specified and well-defined conditions. International agreements, both multi-partite and bi-partite, have been the instruments for facilitating international air navigation through the waiver by the territorial sovereign of its right to require special authorization for flights."²²

Unless the Assembly of ICAO definitely determines to reverse the accepted theory of airspace sovereignty, the agreement should be re-drafted to reaffirm such sovereignty, with its logical conclusion that the flight of aircraft of one nation over the territory of another is an exercise of a *privilege* and not of a *right*.

III. AIR TRANSPORT OPERATIONS AND ROUTES

Chapter II of the draft agreement, entitled "Freedom of the Air," "confers the rights formerly known as the Five Freedoms of the Air in

¹⁹ The Air Navigation Act, 1920, 10 & 11 Geo. 5, c. 80. In SHAWCROSS & BEAUMONT, *AIR LAW* (London, Butterworth, 1945) 421.

²⁰ I. S. Pereterski, *The Air Code of the Union of Soviet Socialist Republics* (1933) 4 Air L. Rev. 153-157.

²¹ Air Commerce Act of 1926, §6(a), 44 Stat. 572, as amended by Civil Aeronautics Act of 1938, §1107 (1) (3), 52 Stat. 1028, 49 U.S.C. §176(a) (1940).

²² CHARLES CHENEY HYDE, *INTERNATIONAL LAW* (2nd rev. ed. pub. Little, Brown, 1945) 604.

greatly simplified form," as explained in the Commentary. As later amplified in the Commentary:

"The right to fly conferred by the Agreement is not confined by particular routes, but is a general right, available for any airline which has been duly authorized by its own government. Hence the question immediately arises whether landings are permitted at each and every airport of each and every country or whether some degree of restriction is necessary. The solution proposed in the Agreement (Article 7) is to require the designation of a reasonable number of international airports in each country which will be available for use by all international airlines whose traffic justifies operation thereto."

In another part of the Commentary, while discussing "capacity," it is explained that the provisions for capacity limitation (which I shall discuss later), are expected to remove the necessity for designating routes or the necessity "to fix the route pattern in terms of reasonably direct routes out from and back to the territory of the State in question, for the traffic flow itself should normally eliminate unnecessary meanderings."

This suggested solution of the difficult route problem is exceedingly interesting. I do not think that it was discussed either at Chicago or Montreal. Apparently it has been one of the primary sources of disagreement between the majority and minority members of the PICAO Air Transport Committee. Paragraph 4 of the Statement of Minority Views raises a question which must be settled by the Assembly:

"We believe it is practicable to lay down a multilateral code of principles, which afford fair and equal opportunity for the development of international air transport. But for a State to be authorized to specify what it individually regards as a sealed pattern for the operation of a route in accordance with the code, without consultation with any other State affected, would inevitably lead to friction and disputation. In our view, it is more practicable at this stage to lay down certain uniform principles which all States would agree to observe in settling routes, which principles must be so drawn that in practice they may be capable of meeting the needs of differing circumstances. Therefore, we consider that route arrangements must continue to be subject to bilateral negotiation within the framework and in accordance with the principles of a multilateral agreement."

Dr. Paul T. David, representative of the United States on the PICAO Air Transport Committee has pointed out difficulties which the draft agreement will entail in operations between contiguous states.²³

"The difficulties respecting services between contiguous States can be well illustrated by considering the problems which would arise if these provisions were made effective for the routes between Canada and the United States. Canada would immediately have the

²³ *Multilateral Agreement on Commercial Rights in International Civil Air Transport: Statement by the Delegate of the United States, Mr. Paul T. David, made at the Air Transport Committee Meeting held February 10, 1947. PICA Doc. 2766-AT/165, Feb. 10, 1947, para. 35.*

right to run an airline to any point in the United States to which Canadian travellers may wish to go, whether such point is close to the border or far away, and whether or not such point is already adequately served by the existing network of Canadian and United States services. By the same token, the United States would immediately have the right to initiate new United States airline services between Chicago, Windsor, Toronto and Montreal; Cleveland and Toronto; New York and Toronto; and any other route from the United States to any point in Canada to which United States travellers may wish to go. It is not apparent that the public interest would necessarily be served by doubling the number of airlines authorized to operate on every route between the United States and Canada, but if the proposed multilateral agreement were in effect, the United States and Canada would be in violation of the agreement if they made a separate bilateral agreement to continue the satisfactory policies respecting trans-border routes which have been in effect for some years."

Even the minority subcommittee draft of Article 7 as to bilateral route agreements goes further, as stated by Dr. David, than had been earlier considered acceptable to the United States:

"I would be less than frank if I failed to indicate that the position which might be regarded as acceptable to the United States is perhaps indicated most accurately by Article 3 of Sub-committee Working Draft No. 21. The language of that draft was as follows:

'Each contracting State grants to each of the other contracting States, the Third, Fourth and Fifth Freedoms, such grant to take effect with respect to any other contracting State after separate arrangements have been made between them concerning routes to be flown between their respective territories and related matters, such as the designation of airports of entry and of the points to be served by the airlines of each party within the territory of the other party to the separate arrangement.'

"Under this language, the actual exchange of rights would never take place as between any particular pair of States unless and until they were able to reach agreement on routes. There would be no compulsion to reach agreement, and there would be no enforceable rights in the absence of ability to reach agreement.

"It seems to me that the real choice of alternatives which the Assembly will wish to consider is between the minority Sub-committee draft and the position just indicated.

"The United States will not be alone in experiencing some reluctance to enter into a binding obligation to exchange rights with any and all comers. Other countries also have the problem of protecting their international airlines from an undue number of other international airlines seeking business over the same routes into the homeland. The easiest way for any country to limit the amount of competition on the routes entering its territory is obviously to limit the number of other countries with which it will exchange rights for any particular connecting route."

The problem raised by the Statement of Minority Views and Dr. David's earlier separate statement is one of grave importance.

As pointed out earlier, the Chicago Air Transport Agreement authorized commercial operating privileges only on routes to and from

the "homeland" of the nation operating the service in question. In the draft Air Transport Agreement considered by the 1946 PICAO Assembly, these same commercial privileges, the so-called "Third, Fourth and Fifth Freedoms," were to be available "only in respect of through air services on routes constituting reasonably direct lines out from and back to the territory of the contracting state whose nationality the aircraft possesses." It is generally admitted that neither the route provision in the Chicago Agreement nor the later proposal at Montreal is satisfactory. The United States Civil Aeronautics Board has certainly had difficulty in construing and applying the Chicago provision.²⁴

On July 25, 1946 the United States, the original sponsor of the Chicago Air Transport Agreement, announced that it was withdrawing its adherence, effective one year thereafter. Other nations have since withdrawn. As the Agreement had not been found generally acceptable, it has little importance at this time except from an historic point of view. It does illustrate, however, the serious problem involved in drafting any multilateral air transport agreement with stated route provisions.

Whether any middle ground can be found between the unlimited right of entry urged by the majority of the Air Transport Committee and some provision for bilateral route-fixing within a code of general air transport principles seems most doubtful.

Article 7 of the draft agreement raises further difficulties. It will be recalled that the Chicago Air Transit Agreement, now accepted by at least twenty-nine nations, contained a reservation of the right of the nation flown over to designate the route to be followed in its territory by any international air service and the airports which any such service may use. A similar general reservation is contained in Article 68 of the Chicago International Civil Aviation Convention. The draft agreement would materially change this situation. In Article 7 (c) it is provided that:

"No contracting State shall deny the use of its airports, insofar as their physical accommodation and traffic capacity permit, to any international air service of another contracting State in respect of stops for nontraffic purposes, if such airports are open to use by its own international air services."

Under this provision, countries with large land masses, such as Argentina, Australia, Brazil, Canada, China, India, and the United States would lose practical route control of foreign air services in transit. In the countries named, certain international air services now or will soon operate both at home and abroad. In the United States, for example, Article 7 (c) would allow any foreign air service crossing the United States in transit to use any airport in the continental United States, Alaska, Hawaii, Puerto Rico, and perhaps the Canal Zone, if

²⁴ *Línea Aérea Taca De Venezuela, C. A., Línea Aeropostal Venezolana, Aerovías Venezolanas, S.A., Applications for foreign air carrier permits, — C.A.B. — (Doc. 2180 et al., Aug. 15, 1946, Order Ser. 5165).*

used by any United States air service, and if that American service was also authorized by the United States to fly abroad. Due to the recent policy of the United States in certificating a large number of its airlines to fly abroad, practically every principal airport in United States territory would be opened *at the sole choice of the foreign air service* for use by such foreign air service. The only control which the United States would retain would be based on the question as to whether the physical accommodation and traffic capacity of the airport concerned permitted the additional foreign air service use.

The Chicago Air Transit Agreement also contained the following section, which was introduced and insisted upon at the Chicago Conference by a considerable number of the smaller nations:

"A contracting State granting to the airlines of another contracting State the privilege to stop for non-traffic purposes may require such airlines to offer reasonable commercial service at the points at which such stops are made.

"Such requirement shall not involve any discrimination between airlines operating on the same route, shall take into account the capacity of the aircraft, and shall be exercised in such a manner as not to prejudice the normal operations of the international air services concerned or the rights and obligations of a contracting State."

No substitute for this provision of the Air Transit Agreement has been included in the new draft agreement. The problem will certainly be raised at the ICAO Assembly and must be answered.

Another difficulty which does not appear solved by the draft agreement arises from the distinction between scheduled and non-scheduled services. It is assumed that the draft agreement applies only to scheduled services, leaving Article 5 of the Chicago Convention to deal with non-scheduled services. Under this Article 5, each nation has the right to "impose such regulations, conditions or limitations as it may consider desirable" on commercial non-scheduled operations of foreign air carriers. In the absence of any agreed international distinction between scheduled and non-scheduled services, the opportunity for discriminatory practices and resulting international friction is certainly present. Before the draft agreement is finally accepted, this question must be answered.

Article 8 of the draft agreement requires any contracting state desiring to exercise the rights conferred by Article 6 to give four months' prior notice to each other contracting state in whose territory it intends its air service to land, and one month's notice where it intends its air service to operate without landing. If the government of any state receiving a notice considers that the proposed operation is "inconsistent with this Agreement or the Convention," it shall advise the state which gave the notice and the matter will thereafter be handled as a disagreement, subject to the arbitration clauses which I shall discuss later.

If the draft agreement is accepted by the United States and ratified as a treaty, it will nullify important sections of the Civil Aeronautics

Act. At the present time any foreign air carrier must make written application to the Civil Aeronautics Board for a permit,²⁵ which can be issued only after a public hearing and after approval by the President of the United States.²⁶ Under the laws of other countries, varying procedures are required before a foreign air carrier is permitted to begin operations. It is assumed that all of these would be superseded by Article 8 of the draft agreement. As stated in the Commentary, the purpose of the provisions of Article 8 requiring notice is to "avoid the nuisance of having to 'qualify before the competent aeronautical authorities' of another State before commencing operations." This apparently means that the giving of such notice is the only procedure required and that the state into which the foreign service is to fly can only object if the proposed service is "inconsistent" with the draft agreement or the Convention. Neither the report of the Air Transport Committee nor the Commentary gives any further explanation as to what character of proposed service could be denied admission under this provision.

IV. CAPACITY

Unquestionably the most important provisions in the draft agreement are those in Chapter III entitled "Capacity." Article 10 (a) as reported out of the Air Transport subcommittee read as follows:

"The amount of capacity which any contracting State shall be entitled to permit its airlines to provide from time to time over various stages of each route shall be that required for the carriage, at a reasonable load factor, of both:

- (i) passengers, mail and cargo taken on or to be put down in its territory; and
- (ii) passengers, mail and cargo moving between points in the territories of other States which the route touches, insofar as capacity for such traffic is not being provided by airlines of the States in which such traffic is taken on or put down."²⁷

After being considered in the full Air Transport Committee, it was slightly amended and appears in the draft agreement as follows:

"The amount of capacity which a contracting State shall be entitled to permit any of its airlines to provide from time to time over various stages of each route shall be that required for the carriage, at a reasonable load factor of both:

- (i) passengers, mail and cargo taken on or to be put down by such airline in the territory of such State; and
- (ii) passengers, mail and cargo moving by such airline between points in the territories of other States which the route touches, insofar as capacity for such traffic is not being provided by airlines of the States in which such traffic is taken on or put down."

It will be noted that the term "capacity" is used without definition,

²⁵ Civil Aeronautics Act of 1938, §402, 52 Stat. 991, 49 U.S.C. §482 (1940).

²⁶ Civil Aeronautics Act of 1938, §801, 52 Stat. 1014, 49 U.S.C. §601 (1940).

²⁷ *Multilateral Agreement on Commercial Rights in International Civil Air Transport: Proceedings of Sub-Committee I of the Air Transport Committee*, PICAOC Doc. 2761-AT/163, February 10, 1947.

and that there is no mention in the text of the draft agreement as to frequency of operation. It is, therefore, assumed that the word "capacity" is used in the sense that it was used by Dr. Edward Warner during a discussion of the difficulties of the Chicago Conference. He pointed out that the insuperable obstacle to agreement at Chicago proved to be the determination of the type and degree of limitation, if any, that should apply to the "capacity" of the carriers of each nation over each of its routes. He then defined capacity as follows:

"'Capacity,' in this sense, is the total capacity to transport commercial load over a given route in some convenient unit of time. It may be expressed, for example, as the product of the number of schedules operated per week multiplied by the average commercial carrying capacity of one of the aircraft of the type used."²⁸

An examination of the text of the draft agreement and the Commentary makes it clear that the provisions of Article 10 (a) (i) give capacity limitations under the so-called Third and Fourth Freedoms; that is to say, carriage of traffic to and from the country of the nationality of the aircraft that is flying, also that the provisions of Article 10 (a) (2) give the capacity limitation under so-called Fifth Freedom traffic. These must be considered separately. In the Commentary attached to PICA Document 2761 (the report of the sub-committee) it is said:

"The first element, namely, traffic taken on and to be put down in the State's own territory is the fundamental element. In most cases it will far outweigh the second element quantitatively. More important, however, is the fact that the right to provide the capacity required for one's own traffic is recognized as inherent and not subject to reduction for any reason."

It will be noted that in the official Commentary, attached to the final report of the Air Transport Committee, substantially the same language is used except that the words "and not subject to reduction for any reason" have been deleted, and the following words substituted, "and not subject to reduction so long as the load factor remains reasonable." This change is important. It was quite apparent from the text of Article 10 (a) (i) as drafted by the sub-committee and as construed in the Commentary, that serious duplications of service might occur. For example, as between the United States and Great Britain, if an inherent right were held by each country to provide capacity for all the traffic moving between them, both Great Britain and the United States could operate separate services each with capacity to carry all of the possible available traffic, resulting in twice as much capacity being offered to the public as the traffic demand might require. It was to the original sub-committee draft that Dr. David addressed his comments as to the difficult situations which would be caused in the handling of traffic between contiguous states. I am not sure that the slight changes made in Article 10 (a) (i) after it left the

²⁸ Edward Warner, *The Chicago Air Conference*, in *BLUEPRINT FOR WORLD CIVIL AVIATION*, *op. cit. supra*, note 7, at 23-34.

sub-committee have obviated all or most of Dr. David's objections. Nor am I clear that the same duplication of service is not still possible which was possible under the sub-committee draft. In the Statement of Minority Views on the final Air Transport Committee report will be found an objection to the draft agreement on the ground that it would "permit the uneconomic duplication of existing services between pairs of States having substantial amounts of air traffic between themselves."

Even if this is not the case, Article 10 (a) (i) offers difficulties. Under Article 11 any state may permit its airlines reasonable discretion as regards the amount of capacity to be offered on the initiation of new international air services. Assuming that all services are new when the agreement takes effect, at the end of some unstated period the capacity of all services on any single route, as I read the Commentary, must be adjusted so that each airline is not offering capacity in excess of what it is filling up on a reasonable load factor basis. This definitely means that as between two countries, for example Great Britain and the United States, "equal opportunity" is not to be construed as an equal division of capacity. Thereafter at further unstated periods, the capacity of each airline on this route must be readjusted with changing load conditions. As stated in the Commentary, the airlines on a route are left free to compete for all the traffic between the two states. "If the airline of one State obtains more of the traffic than that of the other, it may put on more capacity. If the airline of the other State thereupon finds its load factor reduced to a point where it is no longer reasonable, a reduction in capacity on the part of the latter may be required." This would appear to mean that if the airline of one state offers continuously better service, it may increase its capacity with the growth of its patronage to the point where the airline of the other state is legitimately forced out of business. In case of inauguration of a new service on a route already occupied by several airlines, such for example as the inauguration of an Irish trans-Atlantic service in competition with the services already on that route, the new service may start with such capacity as the Irish government deems reasonable. If, however, the existing services were already offering capacity sufficient to carry traffic available, and unless the new Irish services succeeded in taking a sufficient part of the old traffic to get its load factor up to the normal on the route, it might be compelled legally to discontinue operations. In any event its operations would, after some unstated period, be cut back to whatever capacity was commensurate with the traffic which it was able to carry at the route load factor.

These opportunities for vigorous competition for third and fourth freedom traffic under sub-paragraph (i) of Article 10 (a) are in marked contrast to the stringent limitation on fifth freedom traffic under sub-paragraph (ii) of the same Article 10 (a). Construing Articles 10, 11, 12 and 13 together with the Commentary, the following situation is disclosed. On all routes from country A to countries B, C, and D,

airlines of Country A can put on all the traffic desired to carry available traffic at a reasonable load factor. If any substantial amount of the traffic is disembarked at B, then B is a point at which capacity must be recalculated. No aircraft of A can be operated beyond B except at a load factor based on the through traffic from A to C and beyond if local services of countries B or C provide capacity for traffic beyond B. In such a case, the only fifth freedom traffic which an airline of A could pick up at B would be the amount which would fill up the seats still available after the new capacity is determined. A concrete example would be the following: Consider a route from the United States to India via France and Egypt. Considerable traffic load changes will occur at Paris and Cairo. The route will probably thus have three "stages" — New York to Paris — Paris to Cairo — Cairo to India. If 60% is considered a reasonable load factor and 60 passengers per week from New York to Paris and beyond is an average weekly passenger load, then the United States airline can operate from New York with a total aircraft available capacity of 100 seats per week. If 50% of these passengers usually disembark at Paris and if French or Egyptian lines are offering traffic capacity sufficient to take care of local traffic between Paris and Cairo, the United States airline can not fill up its empty 70 seats so as to continue on its through route. It must cut down its capacity out of Paris by reducing the size of aircraft used or the number of frequencies operated so that not more capacity is flown out of Paris than 50 seats per week. The 30 through passengers will go forward and fifth freedom traffic up to 20 new passengers (not 70), can be picked up. If again at Cairo half the through passengers from the United States disembark, the capacity must be reduced to not in excess of 25 passengers per week and fifth freedom traffic not to exceed 10 passengers can be picked up to be carried with the through 15 New York to India passengers, assuming that Egyptian and Indian lines offer capacity equal to the local traffic. In actual practice the load drop at Paris and perhaps Cairo will be even larger.

Obviously this formula has been developed in an attempt to give "equal opportunity" to local lines apparently without due regard to the disastrous economic results on through trunk lines. Whether this will provide the basis for sound and economic operations contemplated by the Preamble to the Convention is open to question.

This situation seems to create the same difficulties which led to the breakdown of a compromise at Chicago. Mr. W. A. M. Burden, Assistant Secretary of Commerce (one of the United States delegates to the Chicago Conference) thus described the situation:

"Lengthy discussions of various possible formulas took place among delegates of the United States, Canada, and the United Kingdom. Those proposed by the United Kingdom and Canada were based on the principle that an airline might fly more trips only when its existing services had been more than two-thirds full for a considerable period. This principle was acceptable to us, but an insuperable obstacle arose when the United Kingdom contended

that only the traffic carried direct from one's home country — as distinct from the traffic picked up en route — should count in establishing the initial frequency of service and in increasing the frequency.

"Intermediate traffic is absolutely essential to the economic operation of long-distance routes, and it is on such routes that air transport can perform its greatest service to mankind. The importance of intermediate traffic is indicated by the experience of our long-distance routes in Latin America. On the Pan American Airways route from New York to Buenos Aires, for example, only 30 percent of the traffic carried to Rio de Janeiro is traffic originating in the United States, the remainder consisting of persons who board the airliners at points outside the United States. When one gets down as far as Buenos Aires, the proportion of traffic from the United States falls to 15 percent.

"Under the British proposal that the amount of service operated be governed by the amount of through traffic, a United States line on a route from New York to Calcutta via London, Rome, and Cairo might be flying three schedules a day to London but only two a week to Cairo and one every two weeks to Calcutta. The number of trips which could be flown on the further sections of long routes would be so low as to make the service unattractive to the traveler and uneconomical for the operator. It would probably be impossible, if such a rule were applied, for a United States line to operate on a business basis beyond Western Europe or, in South America, beyond Rio de Janeiro and Lima."²⁹

Mr. Oswald Ryan, member and Vice Chairman of the Civil Aeronautics Board, has also commented on the necessity of intermediate traffic to maintain the operation of long lines:

"Of the Five Freedoms of the air, the fifth is, of course, of vital importance. The reciprocal grant of this privilege is essential if the airlines of the world are to operate with a minimum of government subsidy, and are to be instruments for the promotion of trade and travel and not merely the instruments of national policy and prestige. Airlines, like the forms of surface transportation, are dependent not only upon terminal traffic, but also upon intermediate or 'pick-up' traffic — traffic which neither originates nor terminates in the airline's national territory. It has been the United States experience that no long air route, domestic or international, can be operated economically unless the operator has the right to fill space made vacant by passengers and cargo discharged along the route. Since through traffic normally occupies a relatively small part of an aircraft's payload capacity, without the support of intermediate traffic that capacity would be largely unfilled on the remoter sections of the route. Private enterprise would have little incentive to conduct international air transportation under such circumstances; the alternative would be government ownership or heavy government subsidy."³⁰

Perhaps I have misconstrued the draft agreement capacity formula. Under present conditions it must be assumed that in most areas on main trunk routes local services would be in a position to offer suffi-

²⁹ William A. M. Burden, *Opening the Sky*, in *BLUEPRINT FOR WORLD CIVIL AVIATION*, *op. cit. supra*, note 7, at 17-23.

³⁰ Oswald Ryan, *International Air Transport Policy* (Sept. 1946) 1 Air Affairs 45-66.

cient capacity to handle local traffic. When this occurs, so it seems to me, the formula must be applied in its strictest sense. It will then produce exactly the same fifth freedom traffic restrictions as those described by Mr. Burden, which the United States and others continuously refused to accept at the Chicago Conference in 1944. Whether such a condition, affecting long trunk routes, will be acceptable now (certainly not acceptable at Chicago), only time can tell.

This fifth freedom problem was one of the basic questions which the United Kingdom and the United States thought they had settled at the Bermuda Conference in January-February 1946. Clause 6 of the Bermuda *Final Act* is as follows:

"That it is the understanding of both Governments that services provided by a designated air carrier under the Agreement and its Annex shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such air carrier is a national and the country of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for and coming from third countries at a point or points on the routes specified in the Annex to the Agreement shall be applied in accordance with the general principles of orderly development to which both Governments subscribe and shall be subject to the general principle that capacity should be related:

- (a) to traffic requirements between the country of origin and the countries of destination;
- (b) to the requirements of through airline operation; and
- (c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services."³¹

Prior to the Bermuda Agreement and after the Chicago Conference the United States had negotiated a number of important bilateral agreements on which no restriction whatsoever was placed on the privilege to pick up and discharge fifth freedom traffic, just as no such limitations had been included in the Chicago Air Transport Agreement. Such agreements were those concluded with Denmark, Sweden, Iceland, Ireland, Switzerland, Norway, Portugal, Czechoslovakia and Turkey. After the Bermuda Agreement, the United States entered into additional bilateral agreements in which practically the exact language of Clause 6 of the Bermuda *Final Act* was agreed upon. These Bermuda type bilateral agreements include: France, Greece, Belgium, Egypt, Lebanon, Brazil, Philippines, Australia, New Zealand, Uruguay, China, Peru, Ecuador, and Siam.

On several occasions, notably in the discussions during the 1946 PICA Assembly, efforts were made to read into the admittedly flexible provisions of the Bermuda language certain restrictions and meanings which I do not think were intended nor which are needed to

³¹ *Air Services Agreement* between the United States of America and the United Kingdom of Great Britain and Northern Ireland. Signed at Bermuda February 11, 1946. Effective February 11, 1946, and *Final Act of the Civil Aviation Conference* held at Bermuda January 15 to February 11, 1946. *Treaties and Other International Acts Series* 1507.

make it a perfectly workable basis for world understanding. These contentions were based principally on the theory that sub-paragraphs (a), (b), and (c) of Clause 6 were not of equal significance and importance; that words had been omitted which should have been included; that sub-paragraph (b) was superfluous and added nothing to the understanding. Notwithstanding these attacks, I think that the language of Clause 6 exactly as written in the United Kingdom-United States agreement is sound. It is admittedly flexible. But no agreement regulating so dynamic an industry as international air transport should ever be too strictly drawn. If the Bermuda Agreement is administered by an impartial arbitral tribunal such as that contemplated in the draft agreement, I am convinced that the original Bermuda language would provide a useful and adequate basis for the continued healthy and rapid growth of a worldwide air transport system to be composed of the airlines of nations both great and small. It would balance area needs for efficient local service against the necessity for sound and economically operated long trunk routes. The language is certainly not more vague and flexible than is the draft agreement formula. It will be noted that the latter contains no definition of the all-important "stages of each route"; fails to state how, when or by whom these route stages will be fixed; does not define "reasonable load factor," nor state over what time period it shall be calculated; nor does it indicate how often capacity must be refigured at staging points. All of these problems are vitally important in the sound and economic operation of trunk airlines.

The draft agreement formula raises many of the problems which are always present in any protective tariff or import quota restrictive system. Local and area operations are apparently aided, but no one can ever tell how much both the country imposing the restrictions and the country affected by the restrictions have suffered from the consequent limitations on unfettered world trade.

The draft agreement formula, in my judgment, may "dry up" many of the most important world airline trunk operations, or may require unduly heavy subsidies for their continuance. It will certainly affect Dutch, French, and British operations to the Far East; British operations via Lisbon and West Africa to Brazil and the Argentine; proposed Australian operations through India, the Near East, and Europe to London; similar proposed South African operations through Egypt and Europe to London; Brazilian operations via Lisbon to Paris and London and via the Caribbean to New York; United States operations to Asia through Europe and to the Argentine both by the East Coast and by the West Coast of South America; and perhaps others.

Another problem which the draft agreement capacity formula raises and does not solve is this: Does it purport to limit the total capacity of a British airline between London and British Rhodesia, or between London and Singapore? A Dutch line between Amsterdam and the Netherlands East Indies? Or a Belgian line between Brussels and the

Belgian Congo? If it does not — and I do not see how any colonial power can well afford to allow an international agreement to interfere with its trade facilities between homeland and colonies — then how does one calculate the fifth freedom traffic which such lines can pick up at intermediate points? In view of the fact that Article 13 of the draft agreement and the official Commentary (paragraph 3.10) makes it plain that “anything an airline is permitted to fly according to the Agreement, it is permitted to fill with international traffic,” a British line to Singapore via Paris, Rome, Cairo and Calcutta can stop at each of these points for traffic under the general right of free entry contemplated in the draft agreement, assuming that these important cities will certainly be named traffic points under Article 7. When this occurs, then under what procedure can this British airline be compelled to cut down its capacity at the intermediate points as local traffic disembarks without at the same time interfering with its right to maintain such London-Singapore trade as the United Kingdom may find politically or economically advisable?

The draft agreement capacity formula needs the most careful and thorough consideration and analysis before it can be accepted as a final basis for world air transport operations.

V. RATES — SUBSIDIES — DISAGREEMENTS

The rate provision (Article 14 of the draft agreement) shows a laudable effort toward clarity and brevity. But it certainly raises difficult questions. It provides that each state require its airlines to charge reasonable rates. No criteria is provided as to what are the elements of reasonableness. If any contracting state considers that rates charged by the airlines of another state are unreasonable and injurious to it, and a disagreement results, the arbitral procedure, to be discussed later, will apply.

One of the principal difficulties is that a transport rate is often entirely “reasonable” so far as the state fixing the rate is concerned when local costs and other conditions are considered. The same rate may be “unreasonable” under conditions in another state to which the airline is flying, and “injurious” to the latter. The existence of this type of situation has been the primary cause for the disappearance of American flag merchant shipping from many world trade routes. The rates charged by its foreign competitors are entirely reasonable from their points of view, but injurious to the United States. Suppose the arbitral tribunal under the draft agreement decides that the rate is reasonable in the eyes of the state fixing the rate, but is injurious to another state, then what happens? The draft agreement is not clear, nor is it made certain whether the decision of the arbitral tribunal on rate questions will result in the uniformity of rates over trunk routes which is so necessary to prevent unfair competition and rate wars. These problems should be further studied.

The subsidy provision (Article 15) does not use the word “subsidy.” It provides that “each contracting State shall refrain from

granting to airlines any form of assistance which fosters competitive practices destructive to other airlines."

A competitive practice which is destructive to another airline is not defined, but certainly must include any practice which results in a competitor suffering great losses in traffic. Such losses might well result to an airline if its competitor puts on faster and larger aircraft and gives better service. If this improved service is the result of government aid, such as the increase of the capital stock in a government-owned airline, government payment for research and engineering, or, as in the case of the United States, subsidy in the form of air mail pay granted after a public statutory hearing before the Civil Aeronautics Board — in these and other such cases, does the article mean that the normal government operations which have resulted in injury to the airlines of another nation are improper and can be re-examined and ordered changed by an arbitral tribunal after complaint is made?

The so-called "disagreement" provision (Article 17) provides an entirely new procedure for the settlement of disputes and results in very real international and economic control of air transport operations. The President of the Council of the International Civil Aviation Organization (who will be elected each three years by the Council) becomes vested with extraordinary new powers under this article. He is to appoint the members of the arbitral tribunals which may hear disagreements "on the interpretation or application" of the draft agreement. The method of selecting members of these arbitral tribunals and the conduct of their proceedings are to be governed by rules to be established hereafter by the Council. The President of the Council is also authorized to issue restraining orders to prevent the starting of a new route or the effectiveness of a new rate if he is of the opinion "on evidence submitted" that such an order should be issued.

The decisions of these arbitral tribunals and orders of the President of the Council are to be binding on contracting states who shall require their airlines to conform thereto. If any airline fails to conform to a decision or order, no contracting state can allow the operation of such airline through its airspace until the airline does act in conformity with the decision or order.

At the Chicago Conference the United States was not prepared to accept economic regulation by an international tribunal. In the Bermuda Agreement, it, in effect, accepted such regulation so far as rates are concerned by allowing rate disputes to be reviewed by the Council of PICAO and agreeing to use its best efforts to put the decision into effect. In certain subsequent agreements beginning with the agreement with Brazil and similarly the agreements with others including Australia, New Zealand, India, and China, the United States has agreed that "the executive authorities of each Government will use their best efforts under the powers available to them to put into effect the opinion expressed in such report" (referring to advisory reports of the PICAO Council) which may be rendered in case of dispute be-

tween parties to the bilateral agreement in question on any matters in the agreement, including capacity as well as rates.

The arbitral provisions of the draft agreement go even further toward complete international economic control, even though by review. A decision referred to the arbitral tribunal is unquestionably binding on both parties to the dispute and will be made effective against an airline failing to conform even though the parties *may not desire to enforce the decision after it has been handed down*. Another difficulty which the arbitral provision creates is this: Under Articles 84-88 of the Chicago Convention, an entirely different procedure for the settlement of disputes is set up with an appeal to the World Court. This procedure must be used in disputes arising under the Convention and the new procedure contemplated in the draft agreement must be used in disputes under that agreement. In many foreseeable cases it will be extremely difficult to determine which procedure should be used. This may produce serious legal and political questions which should be fully considered.

VI. CONCLUSION

The draft agreement has accepted many of the basic theories of the Bermuda Agreement. It provides for general exchange of transit privileges; it does not require or allow preliminary fixing or arbitrary division of operating frequencies or capacity; it provides for general review of economic problems after complaint following inability of the parties to settle a dispute by negotiation. These are great steps forward. However the agreement does, in my judgment, contain certain defects which I have endeavored to point out.

After giving this new draft agreement long and careful consideration, I am still of the opinion, as I have stated before,³² that it would be better to agree on routes bilaterally within the framework of principles to be incorporated in a general agreement. The Statement of Minority Views generally accepts this approach. I regret that the minority draft did not use the exact language of Article 6 of the original Bermuda Final Act. It did use language which apparently was copied from the somewhat different agreement between the United States and India. I also regret that the minority views are based on the creation of mutual rights of flight to be made effective by bilateral agreements with the accompanying provision (Article 7 (b) (iii) of proposed substitute articles) that

"No contracting State shall decline an exchange of routes with any other contracting State on any grounds other than an insufficiency of traffic to justify the proposed operations, or otherwise discriminate unfairly against any such State."

It seems to me that this provision goes much too far and will lead to disputes and grave uncertainty if one state contends that there is

³² John C. Cooper, *The Bermuda Plan: World Pattern for Air Transport* (Oct. 1946) 25 Foreign Affairs 59-71.

sufficient traffic to warrant a new service and the other state denies this contention.

As I said in the earlier part of this article, I hope that the missing air transport provisions in the Chicago Convention can be agreed upon and settled. But when settled and accepted, they must, without question, provide a basis for both *equality of opportunity* and *sound and economical air transport operations*. One should not be sacrificed for the other. A balance must be found.